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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-63

MATTHEWS COMPANY, JOHN MATTHEWS and
JAMES MATTHEWS,
Petitioners,

v.

D. C. WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Matthews Company, John Matthews and James Matthews, petitioners herein, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on June 20, 1974.

OPINIONS BELOW

The June 20, 1974 opinion of the United States Court of Appeals for the Eighth Circuit is reprinted in Appendix A hereto. The September 20, 1973 "Memorandum and Order" con-

taining the judgment of the United States District Court for the Eastern District of Arkansas, Western Division is reprinted in Appendix B hereto. Neither of these two opinions has been officially reported as of the date of the preparation of this petition.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered June 20, 1974 is sought to be reviewed. The motion of petitioners (appellees) for a stay of the mandate pending a petition to the Supreme Court of the United States for a writ of certiorari was granted by the order of the Eighth Circuit entered July 12, 1974.

The jurisdiction of this Court to review said June 20, 1974 opinion and judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1) and § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

(1) Are the holdings of the Court of Appeals as set forth in the June 20, 1974 opinion of Circuit Judge Myron H. Bright inconsistent with the decisions of this Court in *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792, 36 L Ed2d 668, 93 S Ct. 1817 (1973), and in *Edwin L. Wiegand Company v. Jurinko et al.*, 414 U.S. 970, 38 L Ed 2d 214, 94 S. Ct. 293 (October 23, 1973)?

(2) Should the landowner be held liable to a prospective purchaser for violation of the Fair Housing Act where the findings of the district court are that he "was not denied the right to purchase real property because of his race", that he was never "actually denied the right to purchase for any reason",

that he "was in fact offered the opportunity to purchase on terms available to all persons", and that the business practice of the landowner of selling vacant lots to builders only "was not adopted because of racial considerations and was not used, or intended to be used, as a ruse by which to exclude blacks", there being no evidence of any pretext or coverup, "aimed at excluding, or discriminating against, blacks"?

(3) In a Fair Housing Act case may a prospective purchaser require the landowner to change its established business practice by selling a lot to be left vacant or used to build a $5,000 house next door to a $150,000 house in an architecturally controlled residential subdivision?

(4) With respect to findings of fact by the District Court does the June 20, 1974 opinion of the Eighth Circuit erroneously apply the "prima facie" rule instead of the "clearly erroneous" test required by Rule 52(a) of Fed. R. Civ. P.?

STATUTES INVOLVED

This case involves the Civil Rights Acts of 1870 and 1866 (42 U.S.C. § 1981 and § 1982) and the Fair Housing Act of 1968 particularly §804 thereof (42 U.S.C. §3604) which are as follows:

> 42 U.S.C. § 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."
>
> 42 U.S.C. § 1982 provides: "All citizens of the United States shall have the same right, in every State and Terri-

tory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

42 U.S.C. § 3604 provides, in relevant part, that it shall be unlawful—

> "(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.
>
> "(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin."

"Dwelling" as used in § 3604 is defined in 42 U.S.C. § 3602(b) as: "(b) 'Dwelling' means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof."

STATEMENT OF THE CASE

This suit was instituted in April, 1970, by respondent, D. C. Williams, against petitioners, Matthews Company and two of its officers, in the District Court at Little Rock, Arkansas, alleging that petitioners refused to sell him a vacant residential lot in Lakewood (North Little Rock, Arkansas) because he was black.

On March 17, 1970, respondent first contacted any of petitioners, which original contact followed numerous lengthy tele-

phone conversations between his Little Rock lawyer and John Matthews, one of the petitioners. The findings of the District Court with respect to these conversations, which were undisputed at the trial, were that from February 7 through March 13, 1970, respondent's Little Rock lawyer and John Matthews engaged in lengthy conversations concerning integration of Lakewood and other matters with the lawyer telling petitioner John Matthews that his client, D. C. Williams (respondent) could purchase a lot, leave the lot vacant or put up a $5,000 house, even though the house on the lot adjacent might be worth $150,000 and that John Matthews treated these conversations as "threats to destroy Lakewood" as a means to convince John Matthews to use his political influence with the City officials of North Little Rock in connection with an entirely unrelated matter.

The district court found that petitioners "at the time they were first contacted by the plaintiff (respondent) wanted to get the integration of Lakewood started as soon as possible." At the trial there was no substantial dispute of the fact that petitioners desired to have a black family move into Lakewood, but would not sell a vacant lot next to a $150,000 house for plaintiff (respondent) or anyone to build a $5,000 house on it or not to build any house on it if he didn't want to. Respondent (plaintiff) was the first black individual attempting to purchase property in Lakewood or other subdivisions developed by petitioner Matthews Company.

In keeping with recommendations of national subdivision development organizations, petitioners had endeavored to develop residential communities where the quality, design and location of all residences are regulated and controlled and where property values continue to increase over the years. The accomplishment of these objectives was originally attempted by placing a minimum cost required for each residence during the late 1920's and 1930's which was unsatisfactory. Thereafter, a minimum square footage was required for each residence which didn't accomplish the purpose either. About 1950, the pe-

titioners began to require plan approval for each residence, a practice now commonly referred to as "architectural control", but this was not completely satisfactory. In December, 1969, in keeping with practices which other successful suburban developers throughout the United States had tried and found helpful in the development of a better suburbia for this Country, petitioners adopted a policy of not selling lots to individuals but only to approved Lakewood builders.

John Matthews the principal owner of petitioner Matthews Company is on the Board of Trustees of Community Builders Council of the Urban Land Institute (formerly an institute of the Real Estate Board) which has meetings three times a year where different developers throughout the various sections of the Country exchange ideas in an effort to improve residential development so values will increase, and be more desirable and to generally develop suburbia in a more attractive way. Petitioner John Matthews who had been a member of this institute since it was formed some twenty-five years ago, and his son, James Matthews, President of petitioner Matthews Company, returned from an Urban Land Institute meeting in the Baltimore area in the fall of 1969, at which meeting the idea of utilizing a limited number of builders was recommended as being followed uniformly in many of the subdivisions throughout the country. At this fall of 1969 meeting it was brought out that The Rouse Company in developing Columbia between Baltimore and Washington, D. C. used only a very few approved builders. This policy to sell lots only to approved builders was then adopted by Matthews Company in December, 1969, and was set forth in letters to all builder-customers of petitioner Matthews Company, on December 29, 1969. This new business practice adopted in 1969 of not selling lots to individuals but only to approved Lakewood builders was made known to respondent (plaintiff) when he first inquired about buying a lot and is set forth in paragraph numbered eight of his complaint.

The purpose of this change in the business practice of petitioner Matthews Company was, (a) to eliminate vacant lots; (b) avoid unnecessary removal of trees and excessive grading on a lot; (c) to have the residence and carport designed to conform to the particular lot; (d) to stagger houses to give better appearance along the street; and, (e) to thereby insure that values in the subdivision will increase. Nothing whatsoever relating to race, color, religion or national origin entered into the decision of petitioner Matthews Company when it adopted this new business practice in December of 1969 of not selling lots to individuals but only to approved Lakewood builders.

Included in the district court's findings of fact about the conversations (before this suit was filed) between respondent's Little Rock lawyer and petitioner John Matthews is:

> "The topic of conversation in each one of these telephone conversations has included my contention that John Walker seems not seriously trying to move a black family into Lakewood but rather is apparently attempting to harass or frighten us with the prospect of Lakewood integration, his sole purpose apparently being to get us to use our influence with Mayor Laman (mayor of North Little Rock) to stall a proposed apartment project near the Glenview Subdivision where John Walker's clients, Mr. and Mrs. Donnie Williams live."

At the trial petitioner John Matthews testified (which testimony was not disputed) about the first of these lengthy telephone conversations as follows:

> "I called Mr. Walker for the first time on February 7, 1970. It was a very friendly conversation. I had heard of Mr. Walker, told him I had heard of him, and had heard nice things about him. * * * I said, 'Now tell me what your purpose is now.' He said, 'What I want to do is to move a black family into Lakewood.' I said, 'Well, you've called

> the right man because I couldn't want to do anything any more.' This was definitely not the answer Mr. Walker wanted from me."

And to the same effect in the 12/7/71 deposition of John Matthews about this same conversation, to-wit:

> "Now this is an interesting question, because it is the same question you asked me as the first of a series of telephone conversations, lengthy telephone conversations. My answer to you is the same now as it was then I hope, and that is that I personally think that the segregated neighborhoods are morally wrong, that I would like to work with you in every way I could to bring this man and this fine colored family into Lakewood. Now this was our first conversation. I lost your interest I believe about there. Our conversation from then on centered on the part of your wanting to buy a lot in Heritage Park (a part of Lakewood) next to $150,-000.00 house where you could build a $5,000.00 house. * * * my answer remains that we would love to have colored people living in Lakewood. My answer also remains that we would not welcome or approve a $5,000.00 house, and this is what you talked to me about, not the colored question. That was not in it."

In the brief for appellees (petitioners) filed in the Eighth Circuit, it was pointed out that in the district court there was only one plaintiff and in the Eighth Circuit only one appellant, D. C. Williams, although both the Appendix and the brief filed for appellant (respondent) in the Eighth Circuit show "D. C. Williams, et ux., Appellants." The reply brief filed in the Eighth Circuit for appellant (respondent) admits the fact that "Mrs. Williams is not, as appellees have pointed out, a named plaintiff below," but is plaintiff's (respondent's) wife. The June 20, 1974 opinion of the Eighth Circuit incorrectly shows "D. C. Williams, et ux., Appellants." This is important only as a glar-

ing example of another instance where Circuit Judge Bright in his opinion disregards an undisputed fact.

In the third from the last paragraph of the June 20, 1974 opinion of the Eighth Circuit, Circuit Judge Bright states "Matthews could direct that its approved builders make the building lots they buy from Matthews available without discrimination to all persons regardless of race."

Petitioners had already done exactly what Circuit Judge Bright suggests in his opinion.

Both respondent's wife and petitioner James Matthews testified to the effect that Matthews did attempt to make lots sold to builders available to respondent.

At the trial in the district court, Mrs. Dinah C. Williams (respondent's wife) in response to a question by his attorney to state the full text of the March 18, 1970 conversation with petitioner James Matthews (President of Matthews Company) about buying a vacant lot in Lakewood, testified, "he told us at this time that he would not sell us a lot because they did not sell to individuals, that they hadn't sold to individuals, that they hadn't sold any lots to individuals this year. He told us that in order for us to come to Lakewood, we'd have to get a builder and buy a lot or have the builder buy the lot, and we would deal directly with the builder. He told us that we could bring our own builder or *they could suggest a builder for us.*" (Emphasis supplied.)

In addition to the foregoing admission by respondent's wife at the trial that she was told petitioners "could suggest a builder for us," petitioner James Matthews, in his deposition testified with respect to this same conversation, "I told Mr. Williams, I believe Mrs. Williams was there too, that if they wished I would work with them through a builder whom I knew, and would make contact with this builder and for them to get their house

plans up, or think about what they wanted in the way of a house and get back in touch with me and I'd set up this meeting." That they were evasive about house plans and said that they had no house plans yet.

With respect to this change in the business practice of petitioner Matthews Company which the 6/20/74 opinion of the Eighth Circuit refers to as "pure chimera," the specific findings of fact by the District Court are as follows: "John Matthews testified, and the Court finds, that this practice of selling lots only to a limited number of builders, and not to individuals, is widespread among land developers across the country and that Matthews was sold on the idea at the meeting of the Urban Land Institute. It is clear from the evidence that the decision to adopt this practice was not related to racial considerations. Mr. Matthews stated that, since December 29, 1969, the Matthews Company has not sold lots to individuals and that no signs advertising the company's lots for sale have been posted, although a few older signs remained posted due to simple negligence on the part of company employees in failing to remove all of them."

Respondent, D. C. Williams, did not testify at the trial of this case but in his May 27, 1970 deposition related his conversation with James Matthews on March 18, 1970 (following their first conversation on March 17th), and stated, "He did call on the following day and he talked with my wife, telling my wife again the same as he told us the day before, he did not sell lots to individuals, only to builders. But he said he would sell us a house."

The only finding of fact by the District Court quoted in the June 20, 1974, opinion of the Eighth Circuit is that, "Mr. and Mrs. Williams did in good faith attempt to purchase a lot in Lakewood with the intention of building a home valued between $30,000 and $40,000." Although this finding is not material in considering this petition for certiorari and reinstating

the judgment of the District Court, petitioners contend that it is the only finding of fact by the District Court which is "clearly erroneous" under the provisions of Rule 52(a) of Fed. R. Civ. P.

In taking the deposition of respondent on May 27, 1970, he was asked about complying with the provisions of the Bill of Assurance covering all lots in Lakewood, whereupon his Little Rock lawyer objected and stated, "it's my position and contention as his attorney, I want to make it clear, that most of those covenants that you all have, as I have seen them, are patently illegal." This was two months and ten days after respondent had first talked with any of petitioners about a Lakewood lot.

At the trial the constant efforts over a period of many years of petitioners to eliminate and avoid the unsightliness, inattention and undesirability of having vacant unimproved lots in a subdivision was undisputed. It was also undisputed that petitioner Matthews Company does not have or use any real estate salesmen.

Respondent, D. C. Williams, in his December, 1971 deposition in response to questions by petitioners' attorney about wanting to buy a vacant lot in Lakewood testified as follows:

"Q. What would you want to use it for?

"A. Well, maybe in the future, I'll say in the future build a home on it.

"Q. What are you talking about in the future, how far in the future?

"A. Well, when my—I suppose when I become financially able to build the type of home that we would be interested in.

"Q. Are you talking about several years from now maybe?

"A. Yes.

"Q. How old are you now?

"A. Thirty-nine.

"Q. And it would be your purpose just to let your lot remain vacant then for several years until you got ready to build a home on it?

"A. That's right. * * *

"Q. Do you recognize the right and authority of the owner of property to exercise reasonable restrictions in carrying out a general plan in developing the area where the property is located?

"A. No, I do not. * * *

"Q. Now would you just tell me in your own words exactly what your complaint in this law suit is against these defendants?

"A. The complaint is not selling me a vacant lot in Lakewood, refusing to sell me a lot.

"Q. And the fact they wouldn't sell anyone a vacant lot you don't think that makes any difference to you?

"A. I don't know about not selling anyone a vacant lot, but refused not to sell me one.

"Q. Or the fact they would first want to know that he is going to build soon, and build according to the architectural control provisions of the purchaser's agreement and bill of assurance, that wouldn't——

"A. What do you mean by architectural control?

"Q. You have never read one of the purchaser's agreements or the bills of assurance have you?

"A. No.

"Q. Well, it requires the developer to approve the plans for any house that's built there to be sure that it is in

keeping with the type of development in the neighborhood. * * *

"Q. And you have made no effort to obtain a copy of the requirements they have to build in Lakewood?

"A. No."

The testimony of Mrs. Williams, respondent's wife, at the trial in the District Court in the summer of 1972 was somewhat more sophisticated but she admitted that she and her husband (respondent) were "completely in accord" on all of their plans and undertakings.

Accordingly, the undisputed evidence shows that prior to the time this suit was filed in April, 1970, neither respondent, D. C. Williams, nor his wife expressed any intention of "building a home valued between $30,000 and $40,000" and the contrary finding by the district court, obviously based on the change in the testimony presented at the trial in the summer of 1972, is "clearly erroneous."

In the September 20, 1973 "Memorandum and Order" of the district court (Garnett Thomas Eisele, U.S. District Judge), both the individual claim and class action claims of respondent (plaintiff) were dismissed.

On June 20, 1974, a three judge panel of the Eighth Circuit determined that respondent "has failed to show that other black persons have attempted and been denied the right to purchase property in Lakewood or other Matthews Company subdivisions" and approved dismissal of the class action, but ruled that respondent, D. C. Williams, is entitled to the following relief: "(1) a declaratory judgment of his rights to purchase property in any subdivision developed by the Matthews Company; (2) counsel fees on trial and on appeal; * * * (3) court costs; (4) actual damages for the defendant's (petitioner's) failure to sell Williams a lot during the spring of 1970, to include

such sum as will properly compensate plaintiff (respondent) for his deprivation of civil rights and for humiliation suffered by him * * *; and (5) punitive damages not to exceed $1,000," and reversed and remanded the case for the entry of a judgment in the district court "consistent with this opinion."

By order entered July 12, 1974, the Eighth Circuit granted the motion of appellees (petitioners) for a stay of the mandate pending a petition to the Supreme Court of the United States for a Writ of Certiorari.

REASONS WHY WRIT SHOULD BE GRANTED

I

The June 20, 1974 opinion of the Eighth Circuit stands in flagrant disregard of the May 14, 1973 decision of this Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817, which although cited by the Eighth Circuit is in direct conflict with the applicable rulings of this Court in the McDonnell opinion. The following quotations are from this Court's May 14, 1973 decision in McDonnell: that, "the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled"; also, "we think that respondent carried his burden of establishing a prima facie case of racial discrimination and that petitioner successfully rebutted that case. But this does not end the matter. On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application. * * * In the absence of such a finding, petitioner's refusal to rehire must stand." As was ruled in McDonnell (and authorities there cited), the weight to be accorded the evidence about any pretext, coverup, or practice discriminatory in its application should be determined by the district court, the trier of facts.

In the case at bar, the district court has already made and entered findings of fact that the business practice of petitioner Matthews Company of selling vacant lots to builders only, "was not adopted because of racial considerations and was not used, or intended to be used, as a ruse by which to exclude blacks". These findings by the district court were made after respondent was given a full and fair opportunity to demonstrate by competent evidence that the business practices of petitioners were in fact a pretext or coverup for race discrimination as required by the opinion of this Court in McDonnell.

The June 20, 1974 decision of the Eighth Circuit involving the Federal Fair Housing Act is in conflict with the decision of this Court involving the Federal Civil Rights Act in McDonnell which vacates the judgment of the Court of Appeals, Eighth Circuit, and remands to the district court for that court to make findings of fact and determine the weight to be accorded the evidence about any pretext. Because of the findings of fact already made by the district court (which was reversed by the Eighth Circuit), this case should be remanded to the Eighth Circuit with directions to re-enter the judgment of the district court dismissing the claims of respondent. The extreme departure by the Eighth Circuit from the decision in McDonnell involving such important federal questions, until resolved, will be enhanced by the lapse of time.

Another recent decision of this Court constituting a compelling reason for granting the writ in the case at bar is *Edwin L. Wiegan Company v. Jurinko et al.*, 414 U.S. 970, 38 L. Ed.2d 214, 94 S. Ct. 293, where on October 23, 1973, this Court granted the petition for a writ of certiorari directed to the Third Circuit. In Wiegand, a Federal District Court of Pennsylvania had awarded two married women substantial amounts as back wages and attorney's fee for alleged discrimination against them in violation of the Civil Rights Act of 1964. The Court of Appeals, Third Circuit (477 F. 2d 1038) expanded the award of the district court to include seniority and additional back pay. In granting the writ, this Court vacated the judgment and remanded the case to the Circuit Court of Appeals for further consideration in light of *McDonnell Douglas Corporation v. Green, supra.*

Another recent case in which McDonnell is cited and followed is *Fagan v. National Cash Register Company*, 481 F. 2d 1115 (District of Columbia Circuit), where the findings of the district court are affirmed.

2

The pertinent portion of the Fair Housing Act of 1968 (42 U.S.C. 3604) actually involved in the case at bar makes it unlawful to refuse to sell or to discriminate against any person in the terms, conditions or privileges of sale "because of race, color, religion or national origin". In the November 19, 1973 opinion of this Court, *Espinoza v. Farah Manufacturing Company, Inc.*, 414 U.S. 86, 38 L. Ed.2d 287, 94 S. Ct. 334, involving the Civil Rights Act of 1964, the language of the opinion (94 S. Ct. on page 340) restricts the illegal discrimination to the exact language of the federal act involved. In the case at bar, as in Espinoza, there was no discrimination made unlawful by the act. In fact, there was no discrimination at all. The specific findings of fact by the district court include, that respondent "was not denied the right to purchase real property because of his race", that respondent was never "actually denied the right to purchase for any reason", that respondent "was in fact offered the opportunity to purchase on terms available to all persons", that petitioners "at the time they were first contacted by the plaintiff (respondent) wanted to get the integration of Lakewood started as soon as possible", and that respondent failed to show that any person of his race "except the individual plaintiff (respondent) has attempted to purchase property in Lakewood or other subdivisions developed by the (petitioner) Matthews Company".

Nothing in the federal acts require petitioners to seek out prospective purchasers of different races or colors, having different religions, or from different national origins.

3 & 4

The Eighth Circuit wrongfully applied the "prima facie" rule instead of the "clearly erroneous" test required in considering the findings of fact by the district court.

Rule 52(a), Fed. R. Civ. P. provides: "In all actions tried upon the facts without a jury * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Although three of the four "Issues Presented for Review" set forth in the brief for appellees (petitioners) in the Eighth Circuit mentions this "clearly erroneous" test required with respect to findings of fact by the district court, the June 20, 1974 opinion of the Eighth Circuit completely ignores the clearly erroneous requirement but repeatedly mentions "prima facie case". The applicable law is clearly set forth in Wright & Miller, Federal Practice and Procedure; Civil Sec. 2586 (Vol. 9, page 737) as follows: "Though the appellate court can never set aside a finding of fact unless it is clearly erroneous, it must be especially reluctant to set aside a finding based on the trial judge's evaluation of conflicting oral testimony, and will do so only under most unusual circumstances."

Many of the findings of fact of the district court are based on undisputed testimony. It was undisputed at the trial that for many years petitioners had constantly endeavored to eliminate and avoid the unsightliness, inattention and undesirability of having vacant unimproved lots in a residential subdivision and to carry out a general plan to create a neighborhood for people to live where residences were constructed to compliment each other and would increase in value.

A finding of fact by the district court based on testimony which was not contradicted was that from February 7th through March 13th, 1970, respondent's Little Rock lawyer and petitioner John Matthews engaged in lengthy telephone conversations concerning the integration of Lakewood and other matters with the lawyer telling Matthews that his client, respondent, D. C. Williams, could purchase a lot in Lakewood, leave the

lot vacant or put up a $5,000 house even though the house on the adjacent lot might be worth $150,000, and that John Matthews, "believed that his conversations with Mr. John Walker were related to the plaintiff's (respondent's) overtures and that Mr. Walker was using what appeared to be threats to destroy Lakewood as a means to convince Mr. Matthews to use his political influence with the city officials of North Little Rock in connection with an entirely unrelated matter".

An important and compelling reason for granting the writ of certiorari in the case at bar is to secure uniformity of this June 20, 1974 decision of the Eighth Circuit with decisions of courts of appeal in the various circuits and with the decision of this Court with respect to the application of the aforementioned "clearly erroneous" test to findings of fact by the district court, including the following:

Terrell v. Feldstein Company, Inc., 468 F. 2d 910, is a suit in which, in the District Court, plaintiff asserted that in violation of civil rights statutes defendant maintained a racially discriminatory promotional policy. The District Court entered judgment adverse to plaintiff and the United States Court of Appeals, Fifth Circuit, on November 3, 1972, in affirming the District Court stated (on page 911 of the opinion), "the district court's findings of fact more than pass muster under Rule 52(a), Fed. R. Civ. P. * * * In short, Terrell fails to carry his burden of showing, as the attacking party must, that the district court's fact findings were 'clearly erroneous' " (Citing authorities).

Hill v. American Airlines, Inc., 479 F.2d 1057, 1060 (1973, Fifth Circuit), states, "Fundamental to our conclusion is the finding of fact by the district court that American did not discriminate against Hill. Despite our sensitivity to charges of discrimination, this finding is still entitled to the 'clearly erroneous' protection on review afforded by Rule 52(a), Fed. R. Civ. P."

(Citing authorities). The Hill case involves a suit alleging discriminatory employment practices on the part of the airline defendant where the district court entered judgment in favor of the airline defendant and plaintiff appealed. This holding in Hill is equally applicable here.

When findings are made by the District Court, the Court of Appeals is bound by the "clearly erroneous" test set forth in Rule 52 (a), Fed. R. Civ. P., *Aunt Mid, Inc. v. Fjell-Oranje Lines*, 458 F.2d 712 (1972), certiorari denied, 409 U.S. 877, 34 L. Ed. 2d 131, 93 S. Ct. 130. To the same effect see *McAllister v. United States*, 348 U.S. 19, 99 L. Ed 20 (1954), and numerous authorities there cited, affirming the judgment of the U. S. District Court which was reversed by the U.S. Court of Appeals, the U.S. Supreme Court stating that the Court of Appeals in reviewing the findings of the District Court had not applied proper standards and declaring that the Court of Appeals may not set aside the judgment below unless it is clearly erroneous.

All of the foregoing authorities are equally applicable in the case at bar and sustain petitioners' contention that said June 20, 1974 opinion of the Eighth Circuit by disregarding the "clearly erroneous" test for findings of the district court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing compelling reasons, the case at bar is a proper case for issuance of the writ of certiorari and reinstating the judgment of the district court as a matter of sound judicial discretion.

(Memo: In this petition, quotations of and references to testimony not appearing in the September 20, 1973 Memorandum and Order of the district court reprinted in Appendix B hereto are from the Appendix filed by respondent, appellant, in the Eighth Circuit, and if questioned, can be verified by having the clerk of that court certify and transmit same to this Court.)

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 73-1765

D. C. Williams, et ux., Appellants, v. The Matthews Company, et al., Appellees.	Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: March 13, 1974

Filed: June 20, 1974

Before GIBSON, BRIGHT and STEPHENSON, Circuit Judges.

BRIGHT, Circuit Judge.

D. C. Williams, a black man from North Little Rock, Arkansas, brought this civil action, individually and as a class representative for other black persons, charging defendants with racial discrimination in refusing to sell residential building lots to black people in violation of the Civil Rights Acts of 1870 and 1866 (42 U.S.C. §§1981, 1982)[1] and §804 of the Civil

[1] 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and

Rights Act of 1968 (42 U.S.C. §3604).[2] In addition to declaratory and injunctive relief, plaintiff sought compensatory damages and reasonable attorney's fees. Jurisdiction was asserted under 28 U.S.C. §1343[3] and 42 U.S.C. §3612.[4]

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enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

[2] 42 U.S.C. § 3604 provides in relevant part:

[I]t shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.

"Dwelling" as used in § 3604 is defined in 42 U.S.C. § 3602(b) as:

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

[3] 28 U.S.C. § 1343 provides in relevant part:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

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(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

In dismissing the class action aspects of the case and denying Williams any individual relief, the trial court concluded that the defendants accorded Williams "special handling" only for the purpose of accomplishing smoothly some integration of their all-white real estate subdivision, Lakewood, and that the defendants refused to sell Williams a real estate lot in pursuance of their valid policy of restricting sale of lots only to "qualified" building contracts. We reverse and remand.

We think that racial discrimination by the defendants in their real estate operations is shown as a matter of fact and law. The

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(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

[4] 42 U.S.C. § 3612 provides in relevant part:

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for action in Court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

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(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

[Footnotes 3 and 4 continued on following page]

defendants' policy of selling lots only to builders, which, under the circumstances, operated to exclude black persons from acquiring building lots in the real estate subdivision, does not afford any legal justification for defendants' conduct.

I

The facts relating to defendants' conduct appear without substantial dispute in the record. Although defendants attacked the bona fides of Williams' proposal to purchase real estate, the trial court resolved that issue in Williams' favor in finding that "Mr. and Mrs. Williams did in good faith attempt to purchase a lot in Lakewood with the intention of building a home valued between $30,000 and $40,000."

"Lakewood", a large residential subdivision in North Little Rock, Arkansas, is being developed by the defendant Matthews Company, which holds in trust a number of tracts originally part of the vast land holdings of the late Justin Matthews, Sr. Defendant-John Matthews, the son, is chairman of the board of the company; defendant-James Matthews, the grandson, is president. As was the case with four other Matthews Company subdivisions, none of the 2,000 residential lots in Lakewood were occupied by blacks as of the date of the filing of the complaint. At the trial, John Matthews testified that the company had excluded blacks from its subdivisions as an official policy since 1945, but that this policy had been abandoned in approximately 1965. He admitted that he had never notified the public of this change nor taken any affirmative steps to integrate the Lakewood community.

In March of 1970, Williams initiated his inquiry about purchasing a lot in Lakewood. He and his wife, Dinah, taught in the public school system in Little Rock and, at the time of the suit, jointly earned approximately $16,000 annually. Beginning

in September 1969, the Williamses began looking for property upon which to build a larger home for themselves and their two children. They had built their own home in Glenview (a Negro subdivision in North Little Rock) valued at $25,000, and, as a Korean War veteran, plaintiff had available to him V.A. loans. The couple planned to spend between $30,000 and $40,000 on a new home.

During this time, they looked at property in the Lakewood subdivision where they found a "for sale" sign posted on each vacant lot. Each sign gave the price and size of the lot and listed the Matthews Company as seller, with its phone number. If a lot had been sold, the sign gave the owners name. According to the plaintiffs, these signs remained posted up to and after the time their suit was filed on April 29, 1970. Based on their visits to Lakewood, the couple decided to inquire further about four particular pieces of property.

On March 16, 1970, the Williamses called to make an appointment at the Matthews Company. The next day, they met with Mr. James Matthews, the president of the company, who indicated that he could neither accept nor reject their offer to purchase a lot, but would have to take the matter up with his father, John Matthews, and call them later in the week.

On March 18, 1970, James Matthews called the Williamses and for the first time informed them that the company did not sell lots to individuals, but only to builders. He informed the plaintiff that they might find an approved builder and have him purchase a lot, and further advised the couple that it would be better for them to purchase an already constructed home. He suggested that he might even make his mother's "villa" available for $60,000. The couple restated their intention of building their own home. No list of builders was furnished to the Williamses by James Matthews nor was any further contact initiated by him or other members of the Matthews Company.

Shortly after this March 18 conversation with James Matthews, plaintiff attempted to contact several of the builders whose names had appeared on signs on other homes in Lakewood. One of the white builders to whom the couple talked indicated that he would go out of business if he built a house in Lakewood for blacks, but offered to build in a black residential area if they wished. A second white builder also refused to build for the Williamses. After these conversations, the couple approached a black builder, Joe Anderson, to visit the Matthews Company on their behalf.

In mid-April, Joe Anderson met with James Matthews and stated his desire to purchase a lot for the Williamses. Matthews stated that Anderson would have to be an "approved builder" before he could sell a lot to him, but he did not outline any procedures for becoming an approved builder. He informed Anderson that he could not give him any answer on his request until his father, John Matthews, returned from the Orient two months later. At the trial, it appeared from defendants' testimony that the company never had any formal policies or procedures relating to approved builders. According to James Matthews, builders were approved or disapproved by the board of directors, but, according to John Matthews, who was chairman of the board, he had not made any decisions on approving builders for five years and it was his son, James, who made the decisions.

On April 24, 1970, Mrs. Williams contacted James Matthews for the last time. He informed her that he would not sell them a lot and would not give them a decision on letting their builder purchase a lot until John Matthews returned to the country in June. Five days later, the plaintiffs filed this suit.

In defense of the conduct of the Matthews Company, John Matthews introduced into evidence an office memorandum dated February 13, 1970, to demonstrate that the personnel of the

Matthews Company contemplated integration of the all-white Lakewood subdivision. This memorandum, while espousing the principle of integration as "morally right", ordered special treatment of any black person seeking entry into the subdivision, to be handled personally by the senior Matthews, John.[5]

John Matthews, at trial, testified that the corporation could not sell Williams a lot in the subdivision without violating a firm policy to sell lots only to approved building contractors. That policy had allegedly been adopted in late 1969 as a means of insuring an orderly development of the subdivision since approved contractors would undertake prompt construction on those building lots which were made available to them for purchase. As a further reason for justifying the refusal to sell Williams a lot, John Matthews testified that he believed that Williams' attorney, John W. Walker, of Little Rock, would seek to invalidate certain subdivision building restrictions relating to size and cost of homes.

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[5] The office memorandum stated:

As discussed, the longer we develop residential communities, the more we realize, that more effort on the part of the developer and tighter controls on development seem the only way to achieve pleasant places to live where property values will continue to increase over the years.

Cost and square footage restrictions are virtually useless. Plan approval seems the best route but if builders or owners do not want to improve neighborhoods, then plan approval accomplishes little. Thus, we have returned to the regulation that lots will be sold only to approved builders or to individuals who agree to immediate construction by approved builders.

All the above has already been discussed with you and all officials of our Company in great detail.

As to the integration of Lakewood, our Company realizes that integration is the law of the land and our Board of Directors feels that integration is morally right. Thus, we realize that integration of Lakewood is inevitable and we welcome black residents, the sooner the better.

On the other hand, we realize that all-white communities, like Lakewood, are extremely sensitive and that great care is neces-

In denying Williams claim, the district court characterized defendants' policy of selling only to builders as free of racial considerations and described defendants' fear—that sale of a subdivision lot to Williams would produce a challenge to their building restrictions—as sincerely but perhaps mistakenly held. Accordingly, the trial court concluded that plaintiff was not denied the right to purchase property because of his race and that plaintiff was afforded the same opportunity as others to purchase from an approved builder. The trial court additionally determined that "defendants have here demonstrated that their practice of selling to builders has a demonstrated business reason for its retention."

An examination of the statutes and case law require a conclusion contrary to that reached by the district court.

II

The policy of the United States contained in Title VIII of the Civil Rights Act of 1968 is to provide, within constitutional limitations, fair housing throughout the country. 42 U.S.C.

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sary if integration is to be accomplished smoothly and without unpleasant incident.

We also realize that some black people are becoming more militant in their frustration and may wish to cause all the excitement, publicity, harassment, etc. possible, which we feel would be such poor policy for the Negroes and so disruptive to the welfare of this or any other subdivision that, we feel we have a most serious obligation to the community of Lakewood to make every effort to accomplish integration quietly without hurting anyone, black or white, and without lowering Lakewood property values.

To accomplish this, our Board of Directors has requested me to make a personal case of the first black families who move to Lakewood. Our hope is that these black families can quietly move into an existing home with the least possible fanfare or publicity.

Whenever any black family asks you about purchasing a home or vacant lot, your referring them to me will be appreciated.

§3601. Like the 1866 Civil Rights Act, the Fair Housing Title is an exercise of congressional power under the thirteenth amendment to eliminate the badges and incidents of slavery. *United States* v. *Hunter*, 459 F.2d 205, 214 (4th Cir. 1972). As the Supreme Court commented in *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968), construing 42 U.S.C. §1982:

> [W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. [392 U.S. at 442-443.]

Thus, the Fair Housing Title of the Civil Rights Act of 1968 and the 1866 Civil Rights Act together comprehensively spell out the right of an individual to rent or purchase housing without suffering discrimination and to obtain federal enforcement of that fundamental guarantee. 392 U.S. at 413-17.

Recent cases make clear that the statutes prohibit all forms of discrimination, sophisticated as well as simple-minded, and thus disparity of treatment between whites and blacks, burdensome application procedures, and tactics of delay, hinderance, and special treatment must receive short shrift from the courts. *See United States v. Pelzer Realty Company, Inc.*, 484 F.2d 438 (5th Cir. 1973); *United States v. Youritan Construction Company*, No. C-71 1163 ACW (N.D. Cal., filed Feb. 8, 1973); *Hall v. Freitas*, 343 F. Supp. 1099 (N.D. Cal. 1972); *Newbern v. Lake Lorelei, Inc.*, 308 F. Supp. 407 (S.D. Ohio 1968); *Brown v. Lo Duca*, 307 F. Supp. 102 (E.D. Wisc. 1969).

Race is an impermissible factor in real estate transactions under both 42 U.S.C. § 1982 and 42 U.S.C. § 3604 and "cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination." *Smith v. Sol. D. Adler Realty*, 436 F.2d 344, 349-350 (7th Cir. 1970). The courts will look beyond the form of a transaction

to its substance and proscribe practices which actually or predictively result in racial discrimination, irrespective of defendant's motivation. *See United States v. Grooms*, 348 F. Supp. 1130, 1133-1134 (M.D. Fla. 1972); *United States v. Real Estate Development Corporation*, 347 F.Supp. 776, 782 (N.D. Miss. 1972); *United States v. Reddock*, No. 6541-71-P (S.D. Ala., filed Jan. 1, 1972), *aff'd*, 467 F.2d 897 (5th Cir. 1972).

We think that the concept of the "prima facie case" applies to discrimination in housing as much as to discrimination in other areas of life. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This is not a new principle, but is a familiar one in the areas of employment,[6] labor relations,[7] and school[8] discrimination. Thus, where a Negro buyer meets the objective requirements of a real estate developer so that a sale would in all likelihood have been consummated were he white and where statistics show that all of a substantial number of lots in the development have been sold only to whites, a prima facie inference of discrimination arises as a matter of law if his offer to purchase is refused. If the inference is not satisfactorily explained away, the fact of discrimination becomes established. *See Newbern v. Lake Lorelei, Inc.*, 308 F. Supp. 407, 417 (S.D. Ohio 1968).

Here, the defendants admittedly followed a whites-only policy in sales of real estate prior to 1965. John Matthews testified to a change of heart and a willingness, finally, to comply with the law and the obligations of good citizenship, but

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[6] *See Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970) (citing cases); *Marquez v. Omaha District Sales Office, Ford Division*, 440 F.2d 1157 (8th Cir. 1971). *See generally Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[7] *See United States v. Sheet Metal Wkrs. Int. Ass'n, Local U. 36*, 416 F.2d 123, 131 (8th Cir. 1969) (citing cases).

[8] *See Moore v. Board of Ed. of Chidester Sch. Dist. No. 59*, Ark., 448 F.2d 709, 711 (8th Cir. 1971) (citing cases).

this change of heart was demonstrated only by a self-serving office memorandum written in 1970 and entitled, perhaps significantly, "Ever Tightening Lakewood Controls As It Affects Integration." Those tightened controls were exercised through approved builders, none of whom were black and none of whom would break the housing segregation barrier by building a home for a black family in an all-white neighborhood. The Matthews Company made no public announcement of their new devotion to integration, and the record shows that no black man or woman had ever acquired property in any subdivision of the Matthews Company up to and including the time of trial.

The special handling of the efforts of Mr. and Mrs. Williams to purchase a lot in Lakewood, in the light of this factual background, became nothing more than a "run-around" when John Matthews—the sole person having the authority in the company to deal with black persons (although other officers and employees might deal with white persons)—left the United States for an extended tour in the Orient. This undisputed evidence establishes a prima facie case of discrimination.

We do not think that the trial judge reached a contrary determination as to these obvious facts of discrimination.[1]

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[1] The trial court's opinion read in part:

> The background statistical case for plaintiff is obviously very strong, but here we are dealing with a particular series of transactions between plaintiff and his wife and the defendants, and unless defendants' conduct in this instance was at least partially occasioned by racial considerations, plaintiff cannot prevail. The Court is troubled by the fact that defendants did not earlier, much earlier, communicate their change of policy and attitude toward the integration of their subdivisions to the public. And yet, the Court is fully convinced that John Matthews did, as he testified, have a sincere and honest change of attitude, like so many other Southern white businessmen in the early 1960s, and has been honestly convinced since that time that integration is not only legally required but morally

Rather, he apparently assumed that subjective good intentions could overcome the prima facie showing of discrimination, and concluded:

> [T]his "personal handling" procedure was not intended, or used, as a device to delay integration. In fact the defendants at the time they were first contacted by plaintiff wanted to get the integration started as soon as possible.

That conclusion is error. A prima facie case of discrimination resting as it does both on statistical evidence and real evidence cannot be overcome by defendant-Matthews' platitude that "integration is the law of the land and our Board of Directors feels that integration is morally right." Statistics, of course, are not everything, "but nothing is so emphatic as zero." *United States v. Hinds County School Board*, 417 F.2d 852, 858 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970). When a plaintiff makes a prima facie case of discrimination, as here, the burden shifts to the defendant to articulate some le-

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right. And this change in attitude became at that time the new business policy of the defendants.

The Court is concerned that John Matthews decided to make the integration of Lakewood, as indicated by the February 13, 1970, memorandum, a "personal" matter, by, hopefully, directing the first black families into existing homes. This arrangement has implications of special handling that ordinarily would be unacceptable. If this effort to "direct" black families into existing facilities resulted even indirectly in the refusal to sell vacant lots to blacks, then certainly defendants would be denying blacks access to Lakewood on an equal basis with whites. But such was not the case. Another obvious point: if John Matthews, and the evidence seems to so suggest, does not in fact have the time to keep in fairly constant contact with the day-to-day business of the firm, his attempt to "personally" handle the integration of Lakewood could obviously work to delay integration. However, the Court finds that this "personal handling" procedure was not intended, or used, as a device to delay integration. In fact the defendants at the time they were first contacted by the plaintiff wanted to get the integration of Lakewood started as soon as possible.

gitimate, nondiscriminatory reason for the plaintiff's rejection. *See McDonnell Douglas Corp. v. Green, supra,* 411 U.S. at 802.

We need then examine the grounds asserted in the district court's opinion for his conclusion that no unlawful discrimination existed in this case. The trial court determined that Williams was in fact offered the opportunity to purchase on terms available to all persons. The conclusion, as we understand the trial court's opinion, was premised upon the proposal by Matthews to Williams to purchase a lot through an approved builder. In this connection the court also ruled that the procedure of selling to builders only was not adopted because of racial considerations nor was it used, or intended to be used, as a ruse by which to exclude blacks.

Assuming that the requirements of purchasing only through approved builders did not constitute a ruse,[19] this procedure was fraught with racial overtones and cannot overcome the prima facie case of racial discrimination. Here only white builders were approved. The Matthews Company had not communicated notice of any change of policy regarding its segregation practices to these builders. No white builder had ever contracted to build or buy a home for a black person in that subdivision. The Williamses had sought and been refused a lot through white builders. A black contractor selected by Williams found himself in limbo, neither accepted, nor rejected by the Matthews. The undisputed facts show that under the circumstances the alleged procedure of selling lots only to builders carried racial overtones, and such a policy, even though

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[19] Strong evidence in the record tends to suggest, first, that the Matthews Company did not follow a hard and fast rule of selling only to builders but in fact advertised and sold individual lots to whites, and, second, that this requirement for sale permitted the Matthews Company to pretend cooperation with a black buyer while in fact giving him the brush-off. It stretches credulity to believe that the Matthews Company and its officers did not know that white builders would refuse to buy a lot and build a home for a black person in the Lakewood subdivision.

neutral on its face, cannot stand if it in its operation serves to discriminate on the basis of race. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The policy adopted by the Matthews Company to sell lots only through approved builders served here to discriminate against Williams in obtaining a lot. That policy therefore cannot stand nor can it excuse the racial discrimination shown in this case. *See McDonnell Douglas* and *Griggs, supra.*

Finally, the trial court's suggestion—that any taint of discrimination is avoided in this case because "the practice of selling to builders has a demonstrated business reason for its retention"—also rests upon a legally unsound basis and must be rejected. In order to rely upon a "business necessity" justification for a business policy which, though fair in form, is discriminatory in operation, a defendant must demonstrate the absence of any acceptable alternative that will accomplish the same business goal with less discrimination. *See Wallace v. Debron Corporation*, No. 73-1729 (8th Cir., filed Mar. 28, 1974); *United States v. St. Louis-San Francisco Railway Co.*, 464 F.2d 301, 308 (8th Cir. 1972). Here, of course, a number of alternatives are available to avoid the racial effect of the "builders-only" policy. For example, the Matthews Company could sell building lots directly to black persons who indicate a willingness to hire an available competent contractor, black or white, who will build a home in the subdivision for a black person, or Matthews could direct that its approved builders make the building lots they buy from Matthews available without discrimination to all persons regardless of race. The application of the "business necessity" doctrine offered here, however, rests upon pure chimera.[11]

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[11] The sincere belief on the part of John Matthews, as found by the trial court, that applicant Williams would likely seek to upset certain covenants and assurances relating to size and costs of construction in the Lakewood development cannot serve as a basis to overturn the prima facie case of race discrimination otherwise ap-

III

It is surely true that, on a showing of discrimination towards himself and other members of his race, a plaintiff may appropriately file and prosecute a class action on behalf of himself and other members of his race under Fed. R. Civ. P. 23(a). *See Newbern v. Lake Lorelei, Inc.*, 308 F.Supp. 407, 416 (S.D. Ohio 1968) (citing cases). Although we do find some evidence in the case which might have justified a class action, the court determined that plaintiff has failed to show that other black persons have attempted and been denied the right to purchase property in Lakewood or other Matthews Company subdivisions. This finding afforded an appropriate basis for the dismissal of the class action, since one family is not a class and the burden is on the plaintiff to justify permitting the suit to proceed as a class action. *See Cash v. Swifton Land Corporation*, 434 F.2d 569 (6th Cir. 1970); *Crim v. Glover*, 338 F.Supp. 823 (S.D. Ohio 1972).

IV

Accordingly, the plaintiff is entitled under 42 U.S.C. §3612 (c) to the following relief: (1) a declaratory judgment of his rights to purchase property in any subdivision developed by

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parent in the record. We think it clear that Matthews' belief rested upon subjective assumption, not upon evidence, for the record is bare of any showing that Williams intended to cause trouble to the developer. Statements of a black attorney, John Walker of Little Rock, Arkansas, attacking the legal validity of these covenants and assurances were made prior to the time Williams first expressed any interest in purchasing a Lakewood lot. Walker's "legal opinion" can in no way reflect upon the good faith of Williams. Even assuming, *arguendo*, that it would be legitimate to refuse to sell property to an individual who planned to challenge a developer's restrictive covenant or bills of assurance, far more evidence than appears in this record would be required to establish Williams as a "troublemaker" and thus an ineligible land purchaser in the eyes of a reasonable real estate developer.

the Matthews Company; (2) counsel fees on trial and on appeal, *see Knight v. Anciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); (3) court costs; (4) actual damages for the defendant's failure to sell Williams a lot during the spring of 1970, to include such sum as will properly compensate plaintiff for his deprivation of civil rights and for humiliation suffered by him, *see Seaton v. Sky Realty Company, Inc.*, 491 F.2d 634 (7th Cir. 1974); and (5) punitive damages not to exceed $1,000. *See generally Smith v. Sol D. Adler Realty Company*, 436 F. 2d 344 (7th Cir. 1971).

We reverse and remand this case for the entry of a judgment consistent with this opinion.

Reversed and remanded.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

D. C. WILLIAMS, PLAINTIFF.

v. No. LR-70-C-97.

THE MATTHEWS CO., a corporation; JOHN P. MATTHEWS, individually and as President and/or Owner of The Matthews Co.; and JAMES MATTHEWS, individually and as Manager or Agent of The Matthews Co., DEFENDANTS.

MEMORANDUM AND ORDER

(Filed September 20, 1973)

Plaintiff has brought an individual and class action under the Civil Rights Act of April 9, 1966, 14 Stat. 27, as amended; 42 U.S.C. §§ 1981, 1982; 6812 of the Fair Housing Act of April 11, 1968, 82 Stat. 81, 42 U.S.C. § 3612, and the Thirteenth Amendment.

Plaintiff D. C. Williams, a black resident of North Little Rock, Arkansas, alleges that he was denied by defendants the right to purchase real property because of his race. Plaintiff prays for a declaratory judgment, injunctive relief and monetary damages and for a reasonable attorney's fee. This case was tried to the court on July 14, 1972.

Defendant Matthews Company holds in trust a number of tracts of land in the Greater Little Rock metropolitan area.

John Matthews is Chairman of the Board and, at all pertinent times, was the dominant figure in this family business; his son James is President; and his son Charles is a Vice President of the Matthews Company.

The residentially developed area involved in this suit is known as "Lakewood". It consisted, at the time of suit, of approximately two thousand single-family house lots and one apartment building. No blacks owned lots in Lakewood as of the date of the filing of the complaint herein in 1970. John Matthews testified that there was a policy of exclusion of black families from these subdivisions until approximately nine years ago when this policy was reconsidered and completely changed.

The Matthews Company is the present result of a "chipping" off and division of a part of the holdings of Justin Matthews, Sr., by defendant John Matthews and other members of the Matthews family. On January 1, 1955, John Matthews received approximately one-fourth of his father's vast land holdings. John Matthews testified at trial that when his father began developing subdivisions in this area a major concern was to develop large areas and maintain enough control to assure the orderly growth of desirable neighborhoods containing structures which complemented each other. Various methods were used without much success until the present plan was implemented in 1969.[1]

On December 29, 1969, shortly after John and James Matthews returned from a meeting of the Urban Land Institute in Baltimore, James Matthews addressed the following letter to C. Lee C. McConnell, a builder with whom Matthews Company had frequently dealt:

> "This letter is being sent to all of our builder-customers.
> "Beginning December 29, 1969 Matthews Company is

[1] The various methods included price restrictions, square footage requirements, and architectural control.

adopting a policy of selling lots only to approved Lakewood builders. The purpose of this is two-fold:

"1. In the past we have had some unhappy experiences with builders who returned lots after holding them for extended periods of time and thus taking an unfair advantage of our policy of low down payments.

"2. Our experience with individuals has been they will hold lots in an undeveloped stage for an extended period thus causing gaps in the orderly development of the subdivision.

"Thanking you for past business and hoping this new policy meets with your approval."

John Matthews testified, and the Court finds, that this practice of selling lots only to a limited number of builders, and not to individuals, is widespread among land developers across the country and that Matthews was sold on the idea at the meeting of the Urban Land Institute. It is clear from the evidence that the decision to adopt this practice was not related to racial considerations. Mr. Matthews stated that, since December 29, 1969, the Matthews Company has not sold lots to individuals and that no signs advertising the company's lots for sale have been posted, although a few older signs remained posted due to simple negligence on the part of company employees in failing to remove all of them. Plaintiff contends that sales to individuals have been made since December 29, 1969, and introduced a number of warranty deeds executed after December 29, 1969, running from the Matthews Company to individuals who were not "approved" builders. Each deed contains a clause which reads: "This deed is executed in fulfillment of a contract of sale of the property described herein. . . ." Defendants contend that each "contract" referred to in the deeds was between Matthews Company and an "approved" builder. The facts clearly support the defendants in this regard even though

it is easy to understand how the deed records raised plaintiff's suspicions.

Defendants did not maintain a formal list of "approved" builders and neither John nor James Matthews could give a complete list of those builders who had been approved. No black builders have been approved, but there is no evidence that any applied prior to this lawsuit. John Matthews testified that a builder is approved on the basis of his credit rating, past work, and general reputation.

Defendants' practice is to send to the approved builders a list of lots to be offered by the company. A few days later a dinner meeting with the builders is held and all lots being offered are sold at that dinner meeting. The practice has been a success and the defendants have had no trouble in disposing of the lots in this manner or in maintaining quality standards for construction in the subdivision.

The plaintiff and his wife decided at some point in 1969 that their present home was too small and that they would investigate the possibility of purchasing a new home. The investigation led to Lakewood and in March of 1970 the Williamses identified several lots in the area in which they were interested. Mrs. Williams copied down four lot numbers from signs posted on the lots.[2]

On March 17, 1970, Mr. and Mrs. Williams visited Mr. James Matthews at his office. When they informed James Matthews of their desire to make an offer on one of the lots previously listed, James Matthews indicated that these lots were available but that he would have to talk with his father and would contact them later in the week. James Matthews called the Williamses

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[2] The lots listed by Mrs. Williams were: Lot 13, Block 62, Bunker Hill Drive; Lot 21, Block 63, Cornwallis Drive; Lot 22, Block 63, Cornwallis Drive; and Lot 23, Heritage Park.

on March 18 and advised them that the company had not sold to individuals since 1969; that they should get a builder to purchase for them or they could purchase an existing house; and that the Matthewses would give them the name of some approved builders. Mrs. Williams testified that James Matthews also stated that the Williamses could come to Lakewood "without Johnny" and suggested that they could even purchase the villa owned by James' mother for $60,000. (The name, "Johnny", apparently refers to the Williamses' attorney, John W. Walker. The apparent reason for these statements by James Matthews will become clearer as the facts of this case are developed further, *infra*.) He indicated at the end of the conversation that he would contact the Williamses later in the week. The Williamses unsuccessfully attempted to contact James Matthews several times after the March 18 conversation but did reach him on April 24. He again informed them that he could not sell them a lot and that he did not know whether, at this point, the plaintiff's builder could buy a lot for them because he had to wait until his father, John Matthews, returned in June. James Matthews also asked the Williamses if they had a lawyer and received a negative response. The Williamses had no further conversations with agents of the Matthews Company between April 24, 1970, and the date of the filing of this suit on April 29, 1970.

Between the March 18 and April 24 conversations the Williamses contacted two white builders who declined to purchase a lot for them. Their testimony is that one of the builders stated he could not build for blacks because he would go out of business, and the other builder indicated that if the Williamses purchased the lot themselves he would then build for them. After these two contacts with white builders and before the April 24 conversation with James Matthews, the Williamses contacted Joe Anderson, a black builder, who later attempted without success to purchase a lot for them in Lakewood.

It is unclear whether Joe Anderson, the builder the Williamses had secured, visited James Matthews or any of the de-

fendants before the filing of this lawsuit. James Matthews indicated on deposition that Anderson's "application" was rejected because the Matthewses did not believe he initiated contact in good faith but, rather, that his purpose was to instigate this litigation. John Matthews testified, however, that Joe Anderson had not been rejected, but also that he did not talk to Mr. Anderson after this suit was filed on the advice of counsel. He also indicated that Joe Anderson probably would meet the standards set for approved builders and that he would be delighted to talk to him "after this lawsuit is settled." He stated that he is the only person who can approve or reject Joe Anderson because he (John Matthews) is handling all problems incident to the integration of Lakewood.

From February 7 through March 13, 1970, John Matthews and John Walker, attorney for the plaintiff, engaged in a number of conversations concerning the integration of Lakewood and other matters. John Walker at that time also informed John Matthews that it was his opinion that the Matthews Company "bill of assurance" was not valid and that, in his view, if an individual purchased a lot he could leave the lot vacant or put up a $5,000 house even though the house on the adjacent lot might be worth $150,000. The Court is convinced that Mr. John Matthews reasonably believed that Mr. Walker represented the plaintiff and believed that his conversations with Mr. John Walker were related to the plaintiff's overtures and that Mr. Walker was using what appeared to be threats to destroy Lakewood as a means to convince Mr. Matthews to use his political influence with the city officials of North Little Rock in connection with an entirely unrelated matter.[3] On March 25, 1970,

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[3] The Court is not suggesting that Mr. Walker intended to put any improper pressure upon Mr. Matthews. It appears that Mr. Walker was attempting to obtain political assistance in furtherance of projects to aid the black and the poor of North Little Rock. However, the juxtaposition of the issues relating to the plaintiff with these broader, essentially independent, issues clearly left Mr. Matthews with the assumption, even if erroneous, that plaintiff was not sincere

John Matthews reduced to writing his view of, and reaction to, these conversations in the following memorandum:

> "John Walker visited our office on February 6, 1970 accompanied by an older black man. Walker talked with Eunice Kumpe and asked to see Mr. Matthews.
>
> "Mrs. Kumpe asked which one, and Walker replied, 'The young Mr. Matthews.'
>
> "Mrs. Kumpe, thinking he was speaking of Charles began to refer him to Charles' place of business. Walker then informed Mrs. Kumpe he was interested in purchasing a lot in Lakewood and would like to talk with one of the Matthews in this real estate office. Mrs. Kumpe then informed Mr. Walker that both John and James Matthews were out of the office and asked if one of them could call him after they returned.
>
> "Mr. Walker left his card and remarked, 'Will they call?'
>
> "Mrs. Kumpe assured him they would whereupon Mr. Walker said, 'We mean business, etc.'
>
> "I returned Mr. Walker's telephone call the following day as requested and a series of telephone conversations have followed. The last one was on Friday, March 13 from 5:05 to 6:00 P. M.
>
> "The topic of conversation in each of these telephone conversations has included my contention that John Walker seems not seriously trying to move a black family into Lakewood but rather is apparently attempting to harass or

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in seeking to build in Lakewood but was simply being used to bring pressure upon him to obtain his assistance on the unrelated matter. Even if the defendants unreasonably put such interpretation upon said events, they would be entitled to prevail. But here, under all of the circumstances revealed in the evidence, that interpretation cannot be said to have been unreasonable.

frighten us with the prospect of Lakewood integration, his sole purpose apparently being to get us to use our influence with Mayor Laman to stall a proposed apartment project near the Glenview Subdivision where John Walker's clients, Mr. and Mrs. Donnie Williams live.

"Walker admits he is fighting Mayor Laman and would appreciate help from any source in keeping this apartment project from lowering property values in the Glenview Subdivision. My position has been that where residents of detached single family homes often think nearby apartments will lower their property values, we do not agree with this contention. Otherwise, we would not have built Lakewood House and would not now be planning garden and townhouse apartments in the Lakewood Subdivision. We do not think the proposed apartment project will lower property values in the black Glenview Subdivision. We find it extremely difficult to believe that Attorney John Walker sincerely wants to move Mr. and Mrs. Donnie Williams into Lakewood via the tactics he is using. We feel that Walker is a capable lawyer and if he were serious about moving a black family into Lakewood he would have already done so without harassment of builders, Realtors, and the Matthews Company.

"We further feel that Walker's effort to force us to sell the Williams a vacant lot on low terms is not sincere. The reason is that Mr. Walker understands perfectly why we do not sell vacant lots to individuals or unapproved builders. (A case in point is the largest builder of homes in Indian Hills who wished to buy three Lakewood lots last year but was refused.)

"When I explain to John Walker in our long conversations that I find it difficult to believe he seriously wants to integrate Lakewood, Walker occasionally asks if I am calling him a liar. As we go through this ordeal again and

again I get the idea that it is Walker who is calling me a liar, when I assure him we have no objection to his integrating Lakewood.

"In our last conversation of March 13, which was after hours with our files not available, I explained this fact to John Walker and also the fact that my eldest son and wife, and daughter had just driven in from Mexico and were now having a highball in our apartment waiting for me to join them. The fact that I had guests waiting was mentioned several times but John Walker insisted that I hang on the telephone with him. This seemed proof that John Walker's tactics were merely harassment.

"In mentioning that he wanted his clients to buy a Heritage Park lot at a cost of $10,000 or $11,000, Walker advised me that he could accomplish the construction of a $5000 house on a Heritage Park lot despite the fact that other homes in this area are valued at $75,000 or more. I agreed that Walker might be clever enough to accomplish this and explained to him that his own argument seemed all the proof needed to convince anyone why we could not, in good conscience, sell any individual or unapproved builder a vacant lot.

"On this same night of the 13th, John Walker called Charles Matthews, apparently to harass Charles by telling him that I had called him a liar.

"The next morning, Mr. Kaplin, John Walker's Jewish law partner called me to explain why he did not think my suggestion of his buying a finished house then selling it to the Donnie Williams was practical because he was known as a law partner of John Walker.

"I explained to Mr. Kaplin this was not my suggestion but John Walker's. I reminded Mr. Kaplin that I was not a lawyer but that he and Mr. Walker had the reputation of most capable attorneys.

"Mr. Kaplin then said that Walker had told him I wanted to accomplish nothing but merely wanted to take up John Walker's time in talking.

"I told Mr. Kaplin he must have misunderstood Mr. John Walker because Walker had closed our last conversation with the statement that he would come to our office for at least two hours as requested in order to give me an opportunity to explain to him our problems in producing a highly controlled suburban development where harmony and real estate values would be maintained for black and white residents, how our experience had proven to us that we could not safely sell a vacant lot to anyone unless there was a definite agreement that an approved builder would build a home in the immediate future which would not lower the value of its neighborhood because of substandard design or construction.

"Mr. Kaplin said that he would talk with John Walker and have John Walker call me. I have heard nothing to date.

"In the meanwhile, the black couple, Mr. and Mrs. Williams, had a long visit with James one afternoon in which they said John Walker was not their attorney and made other statements which they seemed to refute in a subsequent telephone conversation. The Williams were to call James back again the following day but he has not heard from them since.

"If Walker should call me before I leave town on April 10, I will make an appointment to meet with him at 3:00 some afternoon several days hence, then I will call Charles so that if Walker actually shows up as he failed to do on the one appointment we had previously, Charles would be a witness when Walker and I discussed the following questions:

"1. Who called who a liar?

"2. Kaplin's statement that Walker said I merely wanted to talk?

"3. The Donnie Williams' contention that they seriously wanted to integrate Lakewood, only to apparently refute their previous statements when they realized we would do nothing to stop them?

"4. John Walker's feud with Mayor Laman and his admitted desire to get people to use their influence to stop Laman from allowing the apartment project to be built near the black Glenview Subdivision?

"If John Walker does come in or call after I leave town, it would seem proper for James and/or Charles to ask Walker to postpone his campaign of harassment, or whatever it may be, until my return. The reason is that I have asked that calls from John Walker and other black attorneys be referred to me so that one official only of our company be involved in this particular matter.

"John Walker has assumed the initiative in drawing me into this affair without explaining his intention. I still do not understand just what it is that Walker wishes to accomplish.

"If our company is ever to learn why John Walker will not let us work with him to accomplish his goal, it would seem better for everyone that Walker talk with the same company official each time. June will be here soon and I will be back in the office."

John Matthews left for the Orient shortly thereafter and returned in June.[4]

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[4] Plaintiff's attorney vigorously questioned Mr. John Matthews' interpretation of those conversations on cross-examination.

John Matthews had, prior to the defendants' first contact with the plaintiff, circulated to Eunice Kumpe, H. B. Stubblefield, James Matthews and Charles Matthews the following memorandum, dated February 13, 1970, discussing generally the integration of Lakewood:

> "As discussed, the longer we develop residential communities, the more we realize, that more effort on the part of the developer and tighter controls on development seem the only way to achieve pleasant places to live where property values will continue to increase over the years.
>
> "Cost and square footage restrictions are virtually useless. Plan approval seems the best route but if builders or owners do not want to improve neighborhoods, then plan approval accomplishes little. Thus, we have returned to the regulation that lots will be sold only to approved builders or to individuals who agree to immediate construction by approved builders.
>
> "All the above has already been discussed with you and all officials of our Company in great detail.
>
> "As to the integration of Lakewood, our Company realizes that integration is the law of the land and our Board of Directors feels that integration is morally right. Thus, we realize that integration of Lakewood is inevitable and we welcome black residents, the sooner the better.
>
> "On the other hand, we realize that all-white communities, like Lakewood, are extremely sensitive and that great care is necessary if integration is to be accomplished smoothly and without unpleasant incident.
>
> "We also realize that some black people are becoming more militant in their frustration and may wish to cause all the excitement, publicity, harassment, etc. possible, which we feel would be such poor policy for the Negroes

and so disruptive to the welfare of this or any other subdivision that, we feel we have a most serious obligation to the community of Lakewood to make every effort to accomplish integration quietly without hurting anyone, black or white, and without lowering Lakewood property values.

"To accomplish this, our Board of Directors has requested me to make a personal case of the first black families who move to Lakewood. Our hope is that these black families can quietly move into an existing home with the least possible fanfare or publicity.

"Whenever any black family asks you about purchasing a home or vacant lot, your referring them to me will be appreciated."

The Court finds that Mr. and Mrs. Williams did in good faith attempt to purchase a lot in Lakewood with the intention of building a home valued between $30,000 and $40,000. The crucial question for the Court, however, is whether the refusal by defendants to sell a lot directly to the Williamses was motivated in any part by racial considerations.

The background statistical case for plaintiff is obviously very strong, but here we are dealing with a particular series of transactions between plaintiff and his wife and the defendants, and unless defendants' conduct in this instance was at least partially occasioned by racial considerations, plaintiff cannot prevail. The Court is troubled by the fact that defendants did not earlier, much earlier, communicate their change of policy and attitude toward the integration of their subdivisions to the public. And yet the Court is fully convinced that John Matthews did, as he testified, have a sincere and honest change of attitude, like so many other Southern white businessmen in the early 1960s, and has been honestly convinced since that time that integration is not only legally required but morally right. And this change

in attitude became at that time the new business policy of the defendants.

The Court is concerned that John Matthews decided to make the integration of Lakewood, as indicated by the February 13, 1970 memorandum, a "personal" matter, by, hopefully, directing the first black families into existing homes. This arrangement has implications of special handling that ordinarily would be unacceptable. If this effort to "direct" black families into existing facilities resulted even indirectly in the refusal to sell vacant lots to blacks, then certainly defendants would be denying blacks access to Lakewood on an equal basis with whites. But such was not the case. Another obvious point: if John Matthews, and the evidence seems to so suggest, does not in fact have the time to keep in fairly constant contact with the day-to-day business of the firm, his attempt to "personally" handle the integration of Lakewood could obviously work to delay integration. However, the Court finds that this "personal handling" procedure was not intended, or used, as a device to delay integration. In fact the defendants at the time they were first contacted by the plaintiff wanted to get the integration of Lakewood started as soon as possible.

Were it not for the conflict between John Matthews and plaintiff's attorney, John Walker, the Court would have more difficulty with the case. On the other hand, were it not for this conflict, and the misunderstandings engendered, the parties would most probably have come to a satisfactory understanding.

The Court is convinced that defendants had a reasonable fear of a challenge to their company's bill of assurance and to the legitimate plans for the orderly development of the subdivision because of the conversations between John Matthews and John Walker, and is further convinced that the defendants would have just as readily, and in the same manner, responded to such a challenge by any white person. That fear—perhaps

founded on erroneous assumptions in this instance—was nevertheless real and reasonable and rendered plaintiff "colorless" in the eyes of the defendant.

The Court finds and concludes that plaintiff was not denied the right to purchase real property because of his race. Furthermore, it is not clear that the plaintiff was ever actually denied the right to purchase for any reason.[6] He was in fact offered the opportunity to purchase on terms available to all persons. The procedure of selling to builders only was not adopted because of racial considerations and was not used, or intended to be used, as a ruse by which to exclude blacks. There is no evidence of any conspiracy or any collusion between the defendants and their approved builders aimed at excluding, or discriminating against, blacks.

The plaintiff's individual claim will therefore be dismissed.

The Court must also dismiss the class action allegations in this suit. Plaintiff urges the Court to accept a presumption taken from the employment area, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1970), ". . . that where a practice [there testing, here the use of sales to builders only] has the natural tendency to disproportionately disqualify blacks, otherwise qualified, for housing—the practice must fall unless there is a strong, proven, demonstrative, business reason for its retention." The Court is impressed with this argument and its application to the class action aspects of this case. However, plaintiff has not shown that any member of the alleged class except the individual plaintiff has attempted to purchase property in Lakewood or other subdivisions developed by the Matthews Company. Without

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[6] If for no other reason the case probably should have been dismissed as premature since there was never a refusal to deal with the plaintiff; rather alternatives were broached in good faith, and the delays, under the circumstances, were reasonable and could not be considered tantamount to a denial or a refusal to deal with the plaintiff.

such a showing this action cannot proceed as a class action. *See, Newbern v. Lake Lorelei, Inc.*, 308 F. Supp. 407 (S.D. Ohio, 1968); *Crim v. Glover*, 338 F. Supp. 823 (S.D. Ohio, 1972). Furthermore, the defendants have here demonstrated that their practice of selling to builders has a demonstrated business reason for its retention, so the *Griggs* rationale simply does not apply.

It is ordered that the individual and class action claims of plaintiff be, and they are hereby, dismissed.

Dated this 20th day of September, 1973.

GARNETT THOMAS EISELE
United States District Judge

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-63

MATTHEWS COMPANY, et al.,

Petitioners,

v.

D. C. WILLIAMS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the Eighth Circuit is reported at 499 F.2d 819 and is reprinted in Appendix A of the Petition. The opinion of the District Court, which is not reported, is set forth in Appendix B of the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

Whether the record supports the determination of the Eighth Circuit that the real estate developer of an all white subdivision in North Little Rock, Arkansas maintained a racially discriminatory sales policy?

Statutes Involved

The pertinent provisions of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982, and the Civil Riqhts Act of 1968, 42 U.S.C. §§ 3602(b), 3604(a) and (b), are set forth in the Petition at pp. 3-4.

Statement of the Case

Respondent takes issue with petitioners' statement of facts material to the consideration of the question presented. The Eighth Circuit noted that the facts relating to the conduct of the Matthews Company, et al. "appear without substantial dispute in the record" and proceeded to set them forth, see Petition at p. A-4—A-8.

After the events in question, Mr. Williams filed a complaint against the Matthews Company and its principal officers on April 29, 1970 in the United States District Court for the Eastern District of Arkansas. Jurisdiction was asserted under 28 U.S.C. §§ 1343(3) & (4) and 42 U.S.C. § 3612 to enforce § 804 of the Civil Rights Act of 1968, 42 U.S.C. § 3604, and the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982. Mr. Williams sued individually and as class representative for other black persons similarly situated pursuant to Rule 23(b)(2), Fed. R. Civ. P. for declaratory and injunctive relief, damages and other relief.

On September 20, 1973, after a trial on the merits, the district court dismissed both the individual and class action. The district court opinion did not refer to nor apply the evidentiary standards set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). On June 20, 1974, the Eighth Circuit reversed:

> We think that racial discrimination by the defendants in their real estate operations is shown as a matter of fact and law. The defendant's policy of selling lots only to builders, which, under the circumstances, operated to exclude black persons from acquiring building lots in the real estate subdivision, does not afford any legal justification for defendants' conduct. Petition at pp. A-3—A-4.

Expressly applying the standards set forth in *McDonnell Douglas Corp.* v. *Green, supra*, the Eighth Circuit first determined that "undisputed evidence establishes a prima facie case of discrimination," Petition at A-11, and then examined whether the Company, et al., had carried the burden of demonstrating a "legitimate, nondiscriminatory reason for the plaintiff's rejection," Petition at A-13. Thereupon, the Eighth Circuit concluded that the policy of selling lots only to certain approved builders, all of them white, was racially discrimination not justified by business necessity in this case. Petition at A-13—A-14. However, the class action was held appropriately dismissed and no injunctive relief directed.

On September 18, 1974, Mr. Williams filed a separate petition for a writ of certiorari, No. 74-296, from the failure of the Eighth Circuit to direct that broad injunctive relief issue upon the finding of a sales policy of racial discrimination. The question presented in No. 74-296 is not addressed by the petition in No. 74-63 nor the instant brief in opposition.

ARGUMENT

The Court of Appeals unquestionably scrutinized the record in light of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973) in reaching its decision. The Matthews Company, et al. seek review by this Court because the Eighth Circuit found compelling evidence of racial discrimination in the record where the district court had concluded there was none. The question presented clearly concerns the contents of the record and, therefore, is not one for which the writ is ordinarily granted. It is the practice of the Court that, "we do not grant a certiorari to review evidence and discuss specific facts," *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). *Second,* the Matthews Company, et al. are simply mistaken that *McDonnell Douglas Corp.* v. *Green, supra,* bars Courts of Appeals from ever examining the underlying record in cases of racial discrimination. *Third,* there is no conflict with applicable decisions of this Court or with decisions of another Circuit. Indeed, the Seventh Circuit in *Clark* v. *Universal Builders,* 1 P.H. Inc. EOH ¶ 13,671 at 14,348-52 (decided July 26, 1974), without citing *Williams,* applied the evidentiary standards of *Green* in a § 1982 fair housing case. *Fourth,* the particular issue raised by the petition is of no general significance, but important only to the immediate parties involved. See *Layne & Bowler Corp.* v. *Western Wells Works,* 261 U.S. 387, 393 (1922); *Rice* v. *Sioux City Memorial Park,* 349 U.S. 70, 79 (1954).

CONCLUSION

For the above reasons, a writ of certiorari should be denied.

Respectfully submitted,

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